expected to advance the business of the guaranteeing corporation, it would properly fall within the scope of the implied corporate powers. Such a rule was applied in the instant case and is conducive to the transaction of business in the more usual way.[9]

H. A. M.

COURTS: EFFECT OF AN OVERRULING DECISION—The Supreme Court of California in San Pedro Railway Company v. City of Los Angeles[1] decided that leasehold interests in tide lands were not property within the meaning of the taxing laws. Nevertheless, the city of Los Angeles, disregarding this decision, taxed the leasehold interest of Outer Harbor Dock & Wharf Company, a corporation. The tax was paid under protest by the last-named corporation who, in *Outer Harbor Dock and Wharf Company v. City of Los Angeles,*[2] sued to recover from the city the tax thus paid. While the case was pending and after the opening brief of the appellant was filed in the District Court of Appeal the decision in the San Pedro Railway Corporation case was overruled.[3] The plaintiffs nevertheless contended that the overruled decision was the law of the state for four years and was as effective as a statute. As a corollary, it was argued that the collection of the tax from Outer Harbor Dock & Wharf Company was unlawful, for the reason that the tax, illegal when made, could not be validated by a subsequent decision declaring it legal.

The court however refused to sanction the contentions of the plaintiff, and held that when there are conflicting decisions, the earlier one must be deemed wrong and the latter right, and that the later decision determines the rights and duties of the parties, even though the transaction out of which they sprung occurred before this decision was rendered. By way of dictum the court intimated that under certain circumstances an exception would be made, in cases where equity and justice demand it.

The exception is a departure from our traditional common law theory. On the other hand, the general rule sanctioned in the principal case is a natural consequence of the common law theory that judges do not make law; that their function is *jus dicere non jus dare*[4]; and that in the King and Parliament, to use the words of Hale, is vested the legislative power.[5] The opinions of the judges, on this theory, since they do not make law, are but renewed evidence of it;[6] what they say or have said was never

[9] Supra, n. 1.

[1] (1914) 167 Cal. 425, 139 Pac. 1071.

[2] (Aug. 30, 1920) 33 Cal. App. Dec. 45.

[3] San Pedro etc. Ry. Co. v. City of Los Angeles (1919) 57 Cal. Dec. 273, 179 Pac. 393.

[4] Sir Francis Bacon, Essay on Judicature.

[5] History of the Common Law (4th ed.) 67.

[6] 1 Jones' Blackstone Intro. 69-71; Yates v. Lansing (1811) 9 Johns (N. Y.) 395, 6 Am. Dec. 290; Swift v. Tyson (1842) 41 U. S. (16 Pet.) 1, 10 L. Ed. 865. Austin ridicules this view of Blackstone. For a good discussion of the proposition that judges do make law, see Dicey, Law and Opinion in England, Lecture XI; Maine, Ancient Law, Chap. II.

law,[7] so that one who relies on a decision, as did the plaintiff in this case, does so at his peril.[8]

The application of the doctrine of the principal case may in many instances work a hardship.[9] To avoid this consequence the court will stay the operation of the general rule and will apply the exception, when the facts of the case before it appeal strongly to its sense of justice and equity. There seem to be at least two important situations in which the exception will be made: (1) when a contract made in reliance upon the earlier decision will be impaired by a change in decision, (2) when a departure from the earlier decision would make an act criminal.

The court in Outer Harbor Dock & Wharf Co. v. City of Los Angeles[10] recognized the first situation, citing two decisions of the United States Supreme Court.[11] Our own supreme court, however, has refused to recognize the exception in a decision[12] not referred to in the opinion in the principal case. The courts which protect contracts from the retrospective operation of overruling decisions do so sometimes upon the ground that to allow the decision to operate retroactively would constitute an impairment of the obligation of contract; sometimes upon the ground that a decision construing a statute becomes a part of the statute.[13]

The general rule as to the retrospective effect of judicial decisions is sometimes modified to save a man from criminal prosecution. No one can doubt that it is hard law which brands a man as a criminal for the commission of an act which was expressly declared legal at the time he did it. The courts purge the law of this harshness and temper it with mercy by waiving the general rule and following the exception. The innocence of the defendant is consequently determined by the decision in force when the alleged offense was committed. The reason for the modification is clear. The criminal law should whenever possible reflect the common judgments of humanity as to what is right and just. Animated by this spirit the courts have refused to give the overruling decision a retrospective effect, for to do so would violate the spirit of the provision against the passage of ex post facto laws;[14]

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[7] Mason v. Nelson Cotton Co. (1908) 148 N. C. 492, 62 S. E. 625, 128 Am. St. Rep. 635, 18 L. R. A. (N. S.) 1221; Stockton v. Dundee (1871) 22 N. J. Eq. 56.

[8] Thompson v. Kentucky (1907) 209 U. S. 340, 52 L. Ed. 822, 28 Sup. Ct. Rep. 533; Alferitz v. Borgwardt (1899) 126 Cal. 201, 58 Pac. 460.

[9] Bohannon v. Bank of Shelbyville (1901) 23 Ky. Law Rep. 508, 63 S. W. 474; Louisville Bridge Co. v. City of Louisville (1900) 22 Ky. Law Rep. 703, 58 S. W. 598.

[10] Supra, n. 2.

[11] Taylor v. Ypsilanti (1881) 105 U. S. 60, 26 L. Ed. 1008; Douglas v. Pike Co. (1879) 101 U. S. 677, 25 L. Ed. 968.

[12] Allen v. Allen (1892) 95 Cal. 184, 27 Pac. 30.

[13] Farrier v. New England etc. Co. (1891) 92 Ala. 176, 9 So. 532, 12 L. R. A. 856; Harmon v. Auditor (1887) 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502; Thomas v. State (1907) 76 Ohio St. Rep. 341, 81 N. E. 437, 118 Am. St. Rep. 884, 10 L. R. A. (N. S.) 1112; Douglas v. Pike Co. (1879) 101 U. S. 677, 25 L. Ed. 968; 2 Lewis' Sutherland Statutory Construction (2nd ed.) p. 906, § 485.

[14] State v. O'Neil (1910) 147 Iowa 513, 126 N. W. 454, Ann. Cas. 1912B

would deprive the courts of the privilege of regarding, as the controlling factor in the case, the fact that the defendant relied in good faith upon the overruled decision.[15]

When there is no moral turpitude in the alleged offense, the waiver of the general rule does not outrage public justice. On the other hand, no case has been found in which the general rule has been waived when the offense charged was *malum in se*. A defendant charged with the commission of such an offense cannot complain of the retroactive operation of a judicial decision, for no one has a vested right in the opinion of a court.[16]

The departures from the general rule are not made in protest against our traditional views, but to prevent the hardships which must necessarily follow as the result of a too logical operation of any rule of human conduct. *I. A. C.*

DIVORCE: EFFECT OF INTERLOCUTORY JUDGMENT ON PROPERTY RIGHTS—Prior to the introduction of the interlocutory judgment into California divorce procedure, the property rights of the parties to an action in divorce were determined, and the marriage relation was dissolved, by a single judgment.[1] With the advent of the interlocutory judgment, provided for in 1903 by amendment of the Civil Code,[2] the question at once arose whether the property rights of the parties could be finally adjudicated by this judgment, or whether their ultimate disposition must await the final judgment. Upon this question the legislature had not desired, apparently, to throw any light. And in view of the obvious uncertainty of the relevant code provisions, it is not surprising that the courts, in their efforts to clarify the situation, for a time at least seemed rather to increase than to lessen the confusion.[3]

The purpose of the provision creating the interlocutory judgment was, of course, to prevent either party to a divorce action from entering into another marriage for a period of one year from the entry of such judgment. Except in so far as was necessary to accomplish this object, it was not the intent of the statute to

691. The exception was followed in State v. Bell (1904) 136 N. C. 674, 49 S. E. 163; State v. Longino (1915) 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371.

[15] Supra, n. 14.

[16] Supra, n. 6.

[1] Grannis v. Superior Court (1905) 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

[2] Cal. Civ. Code § 131, ". . . . If it (the court) determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce . . . ."; Cal. Civ. Code, § 132, "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such judgment shall restore them to the status of single persons . . . ."; Cal. Civ. Code, § 61, ". . . . In no case can a marriage of either of the parties during the life of the other be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce."

[3] Pereira v. Pereira (1909) 156 Cal. 1, 103 Pac. 488, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880; Estate of Dargie (1912) 162 Cal. 51, 121 Pac. 320; Brown v. Brown (1915) 170 Cal. 1, 147 Pac. 1168.